U.S. Department of Education
Office for Civil Rights

U.S. Mail: 400 Maryland Avenue, S.W.
Washington, D.C. 20202
Telephone: (202) 453-5900
Facsimile: (202) 453-6015

U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section

U.S. Mail: 950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Suite 4300
Washington, DC 20530
Overnight Mail: 601 D Street, N.W.
Suite 4300
Washington, DC 20004
Telephone: (202) 305-3186
Facsimile: (202) 514-8337

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August 23, 2013

By U.S. Mail
Kevin H. Theriot
Alliance for Defending Freedom
101 Parkshore Drive, Suite 100
Folsom, CA 95603

Dear Mr. Theriot:

Thank you for your letter regarding the Joint Letter of Findings (the Findings Letter) and the Resolution Agreement (the Agreement) of May 9, 2013 resolving the United States' investigation of the University of Montana-Missoula's (University) response to allegations of sexual assault and other forms of sexual harassment.[1] Your letter expresses concern that the Agreement "requires UM to enact an overbroad and vague anti-harassment policy that will violate the constitutional rights of students." We share your interest in preventing sexual assault and other forms of sexual harassment on university campuses and your commitment to protecting the constitutional rights of students. We would like to allay the concerns you expressed in your letter, which appear to be based on a misunderstanding of the Letter and the Agreement. Both documents are wholly consistent with longstanding standards and definitions of sexual harassment and in no way conflict with the free speech and due process rights guaranteed by the Constitution.

[1]As used under Title IX, the term "sexual harassment" encompasses sexual assault, including rape. *See, e.g.*, Department of Education, OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), *available at* http://www.ed.gov/about/offices/list/ocr/letters/colleague-201104.html. Use of the term "sexual harassment" in the Agreement and Findings Letter, as in Title IX guidance, references all forms of sexual harassment, including sexual assault.

The Agreement was reached with the University after a comprehensive investigation that found that University students faced a hostile environment in which their reports of rape and sexual harassment were inadequately addressed. At the conclusion of the investigation, which included interviews of more than 40 witnesses and review of thousands of documents, the United States found that:

- the University's Student Assault Resource Center had received 32 reports of rape in 2010;
- a University-initiated investigation in 2011 revealed nine alleged sexual assaults of students in the previous 15 months;
- evidence suggested that rapes, other sexual assaults and sexual harassment short of assault were seriously under-reported;
- students subjected to rape, other sexual assault or harassment faced a hostile environment — they could not engage in or complete their academic work; they suffered mental health consequences, including suicidal thoughts; they felt unsafe on campus; and some left the University altogether;
- the University failed to eliminate this hostile environment or to adequately respond to complaints of sexual assault and harassment; and
- the University's numerous policies created confusion about when and how to report sexual harassment.

The University cooperated with the government's investigation and voluntarily entered into an out-of-court Agreement to resolve these significant problems.

The Agreement is designed to protect the safety of students at the University and to remedy specific deficiencies identified at the University of Montana. Given the evidence of under-reporting of sexual harassment and assault, the Agreement aims both to create a safe space for students to raise concerns and report complaints of sexual harassment and assault and to give the University tools to address the concerns raised before they amount to a violation of federal civil rights law or cause additional injury to students. As a result, the Agreement calls for the University's policies to clarify that reports of "unwelcome conduct of a sexual nature" can be made to enable the University to investigate *whether* the unwelcome conduct has created a hostile environment, counter under-reporting, and establish an early warning system that affords the University a chance to *prevent* such conduct from creating a hostile environment. *See* Agreement ¶¶ II.A.1, II.A.8, II.A.9; *see also* Findings Letter 8-9. As the President of the University noted in a letter to the University's students, "the University has fully cooperated and collaborated with the investigations to provide UM with a model campus climate that provides a safe and healthy learning setting and respects all students' rights to obtain a quality education. Not only are we moving toward full compliance, but we are also doing the right thing by ensuring respectful and thoughtful approaches to address allegations of sexual harassment and assault." *See* http://umt.edu/safety/dojupdate.php.

The fact that the Agreement requires the University to establish a system for reporting "unwelcome conduct of a sexual nature," for the reasons described above, should not obscure the fact that the Agreement faithfully employs the well-established standard for the "hostile environment" that could exist—and violate the law—if objectively offensive sexual conduct were unaddressed by the University. In fact, the Agreement and the Findings Letter apply the standards and definitions set forth in longstanding Title IX guidance promulgated by the Department of

Education and applied by three Administrations. *See, e.g.*, Department of Education, Office for Civil Rights (OCR), *Revised Sexual Harassment Guidance* (2001) (2001 *Guidance*); Department of Education, OCR, *Dear Colleague Letter* (Jan. 25, 2006) (enclosing 2001 *Guidance* and explaining that "the guidance outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues"); Department of Education, OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011) (2011 *Dear Colleague Letter*).[2] These standards make clear both that sexual harassment is "unwelcome conduct of a sexual nature"[3] and that sexual harassment is not actionable under Title IX unless it amounts to a "hostile environment." To create a hostile environment, "something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive" must exist. Department of Education, Office for Civil Rights (OCR), *Dear Colleague Letter: First Amendment* (July 28, 2003) (2003 *Dear Colleague Letter*).[4] Rather, consistent with the Guidance and relevant legal precedent, the conduct must be objectively offensive to a reasonable person and must be "sufficiently serious to deny or limit the student's ability to participate in or benefit from the [school's] program."[5] Findings Letter at 4; *see also id.* at 5, 8.

Thus, complaints of "unwelcome sexual conduct" can serve as a starting point for investigation but do not alone establish a violation of Title IX; nothing in the Agreement contravenes this longstanding principle. But students should not bear the burden of determining whether sexual harassment has created a hostile environment before they feel empowered to alert their universities to their concerns—and universities need not wait until the point at which legal liability attaches to take appropriate steps to protect their students. Under the Agreement, when someone reports an incident of sexual harassment, that report triggers "an adequate, reliable, prompt, and impartial investigation" to determine whether the harassment created a hostile environment. Agreement ¶ II.A.8. Where the University finds that a hostile environment exists, the University must eliminate it, prevent its recurrence, and remedy its effects.

These standards and requirements are wholly consistent with the Constitution, including the First Amendment and the Due Process Clause. The United States has repeatedly made clear that the laws and regulations that protect students from prohibited discrimination are not intended to restrict the exercise of speech protected under the U.S. Constitution. The Department of Education's Dear Colleague Letter on the First Amendment states unequivocally that "schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the rights of students and faculty, including those court

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[2] The 2001 *Guidance* is available on OCR's website at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html. The 2006 *Dear Colleague Letter* is available on OCR's website at http://www.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html. The 2001 *Guidance* replaced OCR's 1997 Title IX Guidance, but OCR's definitions of "sexual harassment" and "hostile environment" have remained the same since 1997. *See* OCR Guidance, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 26 Fed. Reg. 12033, 12034, 12038, 12040-41 (Mar. 13, 1997) (1997 *Guidance*).

[3] 2006 *Dear Colleague Letter* at 3; 2001 *Guidance* at 2, 7

[4] The 2003 *Dear Colleague Letter* is available on OCR's website at http://www.ed.gov/about/offices/list/ocr/firstamend.html.

[5] 2006 *Dear Colleague Letter* at 3; *see also* 2001 *Guidance* at 5; 2003 *Dear Colleague Letter; Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

precedents interpreting the concept of free speech."[6] Likewise, the Department of Education's guidance on sexual harassment states that "a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights." 2001 Guidance at 22-23; *see also* Department of Education, OCR, *Dear Colleague Letter on Harassment and Bullying* at 2 n.8 (Oct. 26, 2010) (2010 *Dear Colleague Letter*) (recognizing free speech implications and referring readers to the 2003 *Dear Colleague Letter: First Amendment*); Department of Education, OCR, *Racial Incidents and Harassment against Students at Educational Institutions; Investigative Guidance* at 59 Fed. Reg. 11448, 11450 n.7 (1994) (1994 Guidance) (stating that OCR does not "endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment"). Moreover, Title IX does not reach curriculum or in any way prohibit or abridge the use of particular textbooks or curricular materials. *See* 28 C.F.R. § 54.455; 34 C.F.R. § 106.42. The Agreement and Findings Letter are consistent with this guidance. Neither the Agreement nor the Findings Letter inhibits academic freedom or free speech.

Your letter also raises concerns that a harassment policy enacted pursuant to the Agreement would violate students' due process rights in that the Agreement mandates that the University take immediate steps to protect the complainant, including, you assert, disciplinary action, without requiring a finding of continuing danger to persons or property. Alliance Defending Freedom Letter at 8-9. This concern reflects a misinterpretation of the Findings Letter and the Agreement in at least two respects. First, the Agreement does not mandate the imposition of discipline at any point.[7] Consistent with Title IX obligations, the Agreement requires that the University, upon receiving a complaint, undertake "an adequate, reliable, prompt, and impartial investigation" to determine whether the harassment created a hostile environment. *See* Agreement ¶ II.A.8. During the course of its investigation, the University must take steps, if necessary, to protect the complainant from further harassment or assault. Those steps can include, for example, separating the complainant from the alleged perpetrator, providing counseling to the complainant, or providing extensions of time on course work. *Id.* ¶ II.A.9.

Second, the Findings Letter addresses the fact that there may be limited circumstances in which the University of Montana could permissibly choose to take disciplinary action with respect to the accused prior to the completion of its adjudicative process. *See* Findings Letter at 6, 17. Like any public university, the University must abide by constitutional standards in determining when this or any other discipline is appropriate. These standards, as set forth in the legal precedent you cite, allow for the immediate removal from school of "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," with the "necessary notice and rudimentary hearing" following "as soon as practicable."[8] The Agreement also makes clear that the imposition of interim disciplinary actions, when warranted and

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[6] 2003 *Dear Colleague Letter*.

[7] *See, e.g.*, Findings Letter at 5 ("disciplining the harasser where appropriate"); *id.* at 6 ("[a]ppropriate steps may include . . . disciplinary action"); *id.* at 9 n.11 ("may face disciplinary consequences"); Agreement ¶ II.A.14 (procedures should include "examples of the range of possible disciplinary sanctions"); *id.* ¶ VI.B (electronic database to include a field for "the name(s) of the person(s) assigned to . . . bring disciplinary charges (where relevant)").

[8] *See Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.").

appropriate, would not dispose of the need to undertake "an adequate, reliable, prompt, and impartial investigation." Agreement ¶ II.A.8. Thus, the Findings Letter and Agreement do not mandate the use of discipline prior to the completion of its adjudicative process; rather, they recognize that the University may constitutionally do so, and require that the University ensure that any such action be taken "consistently and effectively" in "appropriate" circumstances. Findings Letter at 17.

It is also important to note that the Agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy. We hope that this document will be helpful for schools seeking to address problems similar to those that were identified at the University of Montana. Each school, however, will need to take into account the circumstances on its own campus in adopting practices to comply with Title IX.

Thank you for sharing your concerns with the United States. The Department of Education and the Department of Justice will continue to uphold both the principle that public educational entities and recipients of federal funds must provide a nondiscriminatory educational environment with respect to sex, among other bases, and the principle that they must do so without impinging on the right of free speech that is fundamental both to the American tradition and to the role of the university within that tradition.

Sincerely,

Seth Galanter
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

Jocelyn Samuels
Principal Deputy Assistant Attorney General
U.S. Department of Justice